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SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1798

RICHARD CARPENTER and
STEPHEN BORDERS - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY AND APPENDIX

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SUPREME COURT OF THE UNITED STATES

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No. _____

RICHARD CARPENTER and
STEPHEN BORDERS - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioners, RICHARD CARPENTER and STEPHEN BORDERS, respectfully pray that a Writ of Certiorari issue to review the Order and Opinion of the Supreme Court of Kentucky entered in this proceeding on November 20, 1979.

OPINIONS BELOW

The Opinion of the Supreme Court of Kentucky is reported at 592 S. W. 2d 132 (1980). A Petition for Rehearing was filed and the Supreme Court of Kentucky was ordered to respond. The Order of the Supreme Court of Kentucky overruling Petitioners Petition for Rehearing was entered on February 12, 1980. (Appendix E, p. 42).

JURISDICTION

The Order of the Supreme Court of Kentucky was entered on November 20, 1979, and a timely Petition for Rehearing was denied by Order of the Supreme Court of Kentucky on February 12, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Is it a violation of a defendant's right to due process of law for a court to hold that there is no substantial evidence to support a conviction, but uphold the conviction based on the retroactive application of a substantial change of a state procedural rule.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> . . . [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

Article I section 10 of the Constitution of the United States provides in pertinent part:

> [cl. 1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin

a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto Law,* or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATEMENT OF THE CASE

This case was tried by a jury in the Jefferson Circuit Court on June 28, 29, 30 and July 1, 2, 1976. There were three Defendants in the within action: BLAIR; BORDERS; and CARPENTER. This Writ of Certiorari is brought by only CARPENTER and BORDERS. The Petitioners were charged in a twelve count Indictment with having fired shots into automobiles and business places on the west side of Louisville, injuring persons and property (Transcript of Record, hereinafter designated as T.R., p. 2). After over fourteen hours of deliberation, the jury found the Petitioners guilty of two counts of wanton endangerment in the first degree and two counts of criminal mischief in the third degree and fixed their sentence at one year in the penitentiary.[1] (Transcript of Evidence, hereinafter designated as T.E., pp. 812-813).

The Petitioners perfected a timely appeal to the Court of Appeals of Kentucky. On the 10th day of February, 1978, that Court rendered its opinion which reversed the conviction and ordered that a new trial be granted with directions that if the evidence for the Commonwealth is substantially the same that a directed verdict in favor of the Petitioners be entered. (Appendix A, pp. 19-23).

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[1]By statute, K.R.S. 532.060, the Jury Fixes the Punishment in Kentucky.

On June 30, 1978, the Court of Appeals withdrew its original opinion entered on February 10, 1978, and issued a new opinion. The Court held that where all the evidence is *circumstantial,* the lack of conclusiveness of the test leaves the Court with no alternative but to reverse the conviction of the Petitioners. (Appendix B, pp. 24-32).

On November 14, 1978, the Supreme Court of Kentucky granted the Commonwealth's Motion for Discretionary Review to review the June 30, 1978, decision of the Court of Appeals.

In a Memorandum Opinion Per Curiam rendered on June 12, 1979, the Kentucky Supreme Court affirmed the Court of Appeals' opinion reversing the conviction of Petitioners, CARPENTER and BORDERS. That Court held that the evidence was insufficient to convict the Petitioners. *In fact, the Court stated that there was no relevant evidence in the record before them that linked either of the Petitioners to the charged offenses.* (Appendix C, p. 36).

On June 28, 1979, the Commonwealth filed a Petition for Rehearing in the Kentucky Supreme Court. The Supreme Court of Kentucky granted the Commonwealth's Petition for Rehearing and issued a new opinion rendered on November 20, 1979, which completely reversed the decision of the Court of Appeals and upheld the Petitioners' convictions. The Court reasoned that since the Petitioners had failed to move for a directed verdict at the close of all the evidence, the issue of the sufficiency of the evidence was, there-

fore, not preserved for appellate review. (Appendix D, p. 41).

The Petitioners then filed a timely Petition for Rehearing which was denied on February 12, 1980. Petitioners filed a Motion to Recall the Mandate pending consideration by this Court of the within Petition. Said motion was sustained on March 5, 1980.

REASON FOR GRANTING THE WRIT

1. It Is a Fundamental Violation of the Due Process Clause for the Supreme Court of Kentucky to Hold That There Is No Substantial Evidence of Guilt of These Petitioners and Yet Sustain Their Conviction for Any Reason, Let Alone the Retroactive Application of a Substantial Change in a Procedural Rule.

On June 28, 1979, this Court announced a new standard for acquittal based upon insufficiency of the evidence. The new standard dictates that a defendant cannot now be convicted of a crime where no rational trier of fact could find proof of guilt beyond a reasonable doubt.

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, *Jackson* v. *Virginia, supra,* —— U. S. at ——, 61 L. Ed. 2d 560, 573 (June 28, 1979).

In articulating this new standard for acquittal based on insufficiency of evidence, this Court relied upon the familiar constitutional standard of *In re Winship,* 397

U. S. 358 (1970), which stated that no person may be convicted except upon proof beyond a reasonable doubt as to every element of the offense charged.

> In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Jackson* v. *Virginia,* —— U. S. ——, 61 L. Ed. 2d 560, 571 (June 28, 1979).

In fact, the Supreme Court went so far as to state that a reasonable doubt means "the need to reach a subjective state of near certitude of the guilt of the accused." *Jackson, supra, Id,* at p. 571.

Prior to *Jackson,* the standard for acquittal based upon insufficient evidence was the limited standard of *Thompson* v. *Louisville,* 362 U. S. 199 (1960). In *Thompson,* this Court held that due process protects against a wholly arbitrary deprivation of liberty and that a conviction must be reversed only where the record contains *no* evidence of guilt.

> [W]e find no evidence whatever in the record to support these convictions. "Just as a conviction upon a charge not made would be sheer denial of due process," so is it a violation of due process to convict and punish a man without evidence of his guilt. *Thompson* v. *Louisville, supra,* 362 U. S. at 206.

The "no evidence" standard has now been held to be simply too inadequate to protect against the misapplication of the constitutional standard of reasonable doubt and is, therefore, no longer applicable.

> That the Thompson "no evidence" rule is simply inadequate to protect against misapplication of the constitutional standard of reasonable doubt is readily apparent. "A mere modicum of evidence may satisfy a 'no evidence' standard." . . . Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence . . . —could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt. The Thompson doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of *Winship* has been honored. *Jackson* v. *Virginia, supra,* —— U. S. ——, 61 L. Ed. 2d at 574.

This Court's reasoning makes it clear that the *Winship* standard of reasonable doubt is now the standard for acquittal guaranteed by the due process clause. *Accord, Moore* v. *Duckworth,* —— U. S. ——, 61 L. Ed. 2d 865 (July 2, 1979); *Leonard M.* v. *California,* —— U. S. ——, 61 L. Ed. 2d 878 (July 2, 1979); and *Pilon* v. *Bordenkircher,* —— U. S. ——, 62 L. Ed. 2d 1 (October 9, 1979).

Both the Court of Appeals of Kentucky and the Supreme Court of Kentucky have agreed that there is

no relevant evidence connecting Petitioners with any of the alleged offenses. The Court of Appeals of Kentucky in its opinion rendered on June 30, 1978, reversed the decision of the trial court on the ground that there was *insufficient evidence* to sustain the Petitioners' conviction (Appendix B, p. 27). Likewise, the Supreme Court of Kentucky in its opinion of June 12, 1979, affirmed the opinion of the Court of Appeals and agreed that there was "no relevant evidence linking CARPENTER and BORDERS to the charged offenses." (Appendix C, p. 36).

However, the Supreme Court of Kentucky in its opinion dated November 20, 1979, opted to set aside its opinion of June 12, 1979, and ignore the constitutional mandate of the new standard for conviction established in *Jackson.* The Court upheld the Petitioner's convictions because of an alleged procedural error committed at trial by counsel for Petitioners in not making a Motion for A Directed Verdict at the close of all the evidence, even though its earlier opinion acknowledged that there was *no* relevant evidence connecting Petitioners with any of the charged offenses. (Appendix D, p. 41). The Supreme Court of Kentucky based its reissued opinion on the holding of *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977). That case was not decided until well after the Petitioners' trial and held that in order to preserve the issue of sufficiency of the evidence it is necessary to make a Motion for a Directed Verdict at the close of all the evidence.

It should be noted at this point that *Kimbrough's* procedural rule represented a clear departure from the

customary procedure for preserving the question of the sufficiency of the evidence that was in effect at the time of Petitioners' trial. In writing the opinion of the Supreme Court of Kentucky rendered on November 20, 1979, Justice Clayton noted that prior to *Kimbrough* the state of the law on that issue was uncertain, and that the decision in *Kimbrough* was a *clarification* of the procedural rule for preserving the sufficiency of the evidence question. [Appendix D, p. 40.] Hence, it was not until April 1, 1977, nine months subsequent to the Petitioners' trial, that a definitive statement on this particular point of criminal procedure was established by the Supreme Court of Kentucky. In short, it was not until well after the Petitioners' trial that attorneys were given notice of the new manner in which the sufficiency of the evidence issue could be preserved for Appellate review.

The law in effect prior to *Kimbrough, at the time of Petitioners' trial,* required only that a Motion for A Directed Verdict of acquittal be made at the close of the Commonwealth's case in order to preserve the sufficiency of the evidence issue. In a separate opinion written by Chief Judge Martin concurring with the decision rendered by the Kentucky Court of Appeals on February 10, 1978, it was noted, and properly so, that *Kimbrough* represented a clear departure from prior case law in the Commonwealth of Kentucky. Judge Martin also correctly pointed out that the question of the sufficiency of the evidence could have been preserved at the time of Petitioners' trial by a Motion for a Directed Verdict at the close of the Common-

wealth's case or at the close of all the evidence, or even in a Motion for a New Trial.

> . . . a question of sufficiency of the evidence could have been preserved either by motion for a directed verdict at the close of the Commonwealth's case, or at the close of all the evidence, or even in a motion for a new trial. See *Crain* v. *Commonwealth,* Ky., 484 S. W. 2d 839, 842 (1972): Civil Rule 61.02, made applicable to criminal cases pursuant to Criminal Rule 13.04: *Stone* v. *Commonwealth,* Ky., 456 S. W. 2d 43, 44 (1970). [Appendix B, p. 30.]

Counsel for Petitioners did, in fact, adhere to the precise standards available for preserving the issue of the sufficiency of the evidence as enumerated above by Chief Judge Martin and by the Kentucky Court of Appeals in *Crain.*[2] Counsel first moved for a directed verdict at the close of the Commonwealth's case and then raised the question of the sufficiency of the evidence in their motion for a new trial. In short, counsel had complied with all of the mandatory procedures for preserving the sufficiency of the evidence question that were in effect at the time of Petitioners' trial. Yet, Petitioners have been penalized and made to suffer a manifest injustice as a result of following the very standards prescribed by the Courts of Kentucky at the time of their trial for preserving the sufficiency of the evidence question. Said penalty is contrary to the basic

[2]Until January 1, 1976, Kentucky had no intermediate appellate court and its highest court was the Court of Appeals of Kentucky. In 1974 Chapter 84 of the 1974 Acts of the General Assembly was adopted creating the Kentucky Supreme Court.

concept of fundamental fairness and Due Process of Law and, therefore, cannot constitutionally stand.

In a most recent case, the United States Court of Appeals for the Sixth Circuit has relied on the reasoning employed by this Court in *O'Conner* v. *Ohio,* 385 U. S. 92, 17 L. Ed. 2d 189, 87 S. Ct. 252 (1966) and held that when a retroactive application of an opinion of the court substantially changes the law, due process mandates that a defendant cannot be charged with anticipating the new change in the law. *Isaac* v. *Engle,* —— F. 2d ——, No. 78-3488 (6th Cir. Feb. 8, 1980).

The facts of *Isaac* are strikingly analogous to the case at bar. In *Isaac,* the trial court instructed the jury that the defendant bore the burden of proving his affirmative defense by a preponderance of the evidence. This was the law at the time of trial and the defendant did not object. *Subsequently,* the Supreme Court of Ohio changed this standard and held that the defendant need only go forward with evidence sufficient to raise the defense. One year later that same court applied this new standard retroactively. The defendant sought Habeas Corpus relief and the Sixth Circuit, relying on this Court's opinion in *O'Connor, supra,* reversed the district court and held that the petitioner could not be denied Habeas relief, reasoning that the defendant should not have been charged with anticipating the future change in Ohio law that invalidated the standard that was used at his trial. That Court correctly pointed out that the defendant did not object to the standard used by the trial court because that was the only standard available to him at that time.

In essence, to require the defendant to object to the only standard available to him at trial would have been to require the doing of a vain act.

* * *

> . . . yet, in the case at bar every recognized authority on affirmative defenses in Ohio as well as dictum from the Ohio Supreme Court reinforced the propriety of the trial court's charge to the jury. Thus, existing law provided no basis for an objection to the court's jury instructions at the time of trial. *To require an objection in these circumstances would be to require the doing of a vain act.*
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> * * *
>
> *In O'Connor* v. *Ohio, the Supreme Court held that the failure to object at trial to a practice that Ohio had long allowed could not deprive the petitioner of his right to attack that practice in the state courts following its subsequent invalidation by the Supreme Court. The Court reasoned that defendants cannot be charged with anticipating future decisions invalidating past practices.* Though O'Connor involved the attempted assertion of a federal claim, we believe the logic of that decision to be equally persuasive in the context of the present case. [Emphasis Added.] *Isaac, supra, Id.* at p. 8.

As in *Isaac,* Petitioners, CARPENTER and BORDERS, should not have been charged with anticipating the future standard enunciated in *Kimbrough* for preserving the issue of the sufficiency of the evidence, since that decision substantially changed the standard in effect at the time of their trial. By upholding the

Petitioners' convictions the Supreme Court of Kentucky is, in effect, stating that Petitioners should have deviated from the only standard available at trial for preserving the sufficiency of the evidence issue. However, it is obvious that Petitioners would have been performing "a vain act" by deviating from the only standards available to them. Due Process of Law and fundamental fairness prohibits the State of Kentucky from penalizing the Petitioners for not performing acts which would have been in vain at the time of their trial. Petitioners should not be so deprived for their failure to deviate from the only standards available at their trial for preserving the sufficiency of the evidence issue.

This Court has long recognized the exception to the general rule that a court is bound to apply the law in effect at the time it renders its decision. That exception prevents an appellate court from applying a current law, if the law's application would bring about a manifest injustice on the parties. This Court has held that the appellate courts should struggle hard against a construction which would by a retrospective application create a manifest injustice to the parties.

> The Court in *Thorpe, however, observed that exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision "had been made to prevent manifest injustice,"* citing *Greene* v. *United States,* 376 U. S. 149, 11 L. Ed. 2d 576, 84 S. Ct. 615 (1964). Although the precise category of cases to which this exception applies has not been clearly delineated,

> the Court in Schooner Peggy suggested that such injustice could result "in mere private cases between individuals," *and implored the courts to "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties."* [Emphasis Added] [Citation omitted.] *Bradley* v. *Richmond School Board,* 416 U. S. 696, 40 L. Ed. 2d 476, 491, 94 S. Ct. 2006 (1974).

It cannot be disputed that under our system of justice it would be a mainfest injustice to these Petitioners to sustain their conviction where there is admittedly no relevant or sufficient evidence to support the finding of guilt.

The retroactive application of *Kimbrough* is also violative of the Due Process Clause since it operates precisely like an ex post facto law. In a concurring opinion rendered by Chief Judge Martin of the Kentucky Court of Appeals, it was pointed out, and properly so, that since the *Kimbrough* rule affected the Petitioners' substantial rights, its application operated precisely like an ex post facto law which is prohibited by Article I, §10 of the Constitution of the United States. [Appendix B, p. 30.]

This Court has held that the legislature may prescribe different modes of procedure in its discretion, but in doing so it cannot lawfully dispense with any substantial rights that the existing law affords to the defendant. A statute which takes from the defendant a substantial right is said to be ex post facto in nature, and, therefore, prohibited by the United States Constitution.

> . . . "The legislature may abolish courts and create new ones, and *it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.*"
>
> * * *
>
> . . . But it was held in Hopt v. Utah above cited, *that a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be ex post facto in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. Thompson* v. *State of Utah,* 18 S. Ct. 620, 170 U. S. 343, 42 L. Ed. 1061 (1898). [Emphasis Added.]

If a state legislature is barred by the Ex Post Facto Clause from passing such a procedural law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

> If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. *Bouie* v. *Columbia,* 378 U. S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1963).

From this Court's reasoning above it becomes very apparent that Judge Martin was correct in his con-

clusion that the *Kimbrough* rule operated like an Ex Post Facto law. The Supreme Court of Kentucky's judicial construction of the *Kimbrough* rule has resulted in the Petitioners' loss of a most substantial and fundamental right which is guaranteed by the Due Process Clause of the United States Constitution. That right dictates that no one can be made to suffer the onus of a criminal conviction which is based on no relevant evidence.

This Court has repeatedly held that the rules of procedure are devised to promote the ends of justice and *not* defeat them. Rules of procedure should *not* and *cannot* require the sacrifice of the rules of fundamental justice.

> *Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.* A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. *Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.* [Emphasis Added.] *Hormel* v. *Helvering,* 312 U. S. 552, 85 L. Ed. 1037, 1041 (1940).

Clearly, the ends of justice and fundamental fairness have been erroneously defeated by the Supreme Court of Kentucky's retroactive application of the rigid procedural rule enunciated in *Kimbrough.* Said application is contrary to the new constitutional mandate of *Jackson.* That new standard for acquittal allows for

no exceptions or deviations and dictates that a conviction cannot be upheld where there is insufficient evidence to establish guilt. Procedural rules must remain flexible in order to guard against the very injustice that these Petitioners have suffered. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Mitchell* v. *W. T. Grant Company,* 416 U. S. 600, 610, 40 L. Ed. 2d 406, 415, 95 S. Ct. 1895 (1974), quoting *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895 (1961); *Stanley* v. *Illinois,* 405 U. S. 645, 650 (1972). Petitioners pray that this Court grant the Writ of Certiorari, and negate the Supreme Court of Kentucky's inflexible application of the procedural rule established in *Kimbrough,* since that application defeats the ends of justice by forcing the Petitioners to suffer the onus of a criminal conviction when there has been absolutely no relevant evidence establishing their guilt.

CONCLUSION

The Supreme Court of Kentucky, in upholding these convictions, violated the Petitioners' right to substantive Due Process of Law as guaranteed by the Fourteenth Amendment of the United States Constitution. The Supreme Court of Kentucky has opted to retroactively apply an inflexible procedural rule and uphold a conviction, where it is conceded by all of the Appellate Courts of Kentucky that there is no relevant evidence connecting the Petitioners to any of the charged offenses. The Supreme Court of Kentucky's

judicial construction and retroactive application of the procedural rule established in *Kimbrough* has stripped the Petitioners of their fundamental right to be acquitted of an alleged crime where there has been no relevant evidence establishing guilt. For the reasons hereinabove stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

OPINION RENDERED: FEBRUARY 10, 1978
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

File No. CA-568-MR

JEROME BLAIR,
RICHARD CARPENTER, and
STEPHEN BORDERS - - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From the Jefferson Circuit Court
Honorable Charles Leibson, Special Judge
Action No. 156577

REVERSING AND REMANDING

BEFORE: MARTIN, Chief Judge, COOPER and HOWARD, Judges.
COOPER, Judge. The appellants were convicted in Jefferson Circuit Court on two counts of wanton endangerment and two counts of third degree criminal negligence.

The trial and conviction of the appellants arose out of an incident in the early morning hours in the West end of Louisville, Kentucky, on the 30th and 31st of March, 1976. On that date, Slim's Grill located at 421 South 19th Street, Club Cobra located at 38th and Broadway Streets, and Victory Liquors located at 2600 West Jefferson Street in Louisville were peppered by shotgun fire. Several automobiles parked on the streets in the adjacent areas were also peppered with the shot. A waitress in Slim's Grill

was severely injured with a wound in the head. She suffered brain damage and blindness to the extent of being mentally incompetent, and therefore was unable to testify at the appellants' trial.

The appellants were police officers for the Louisville Police Department and were off-duty during the night and early morning of March 30th and 31st, 1976. All were indicted in a twelve (12) count indictment.

The testimony of the various witnesses is lengthy and sometimes contradictory, but for the purpose of this opinion a statement of the basic facts will be given.

The appellants, Blair, Borders and Carpenter, left a meeting of the Fraternal Order of the Police at the Ramada Inn on Hurstborne Lane on March 30, 1976, between 8:30-9:00 p.m. and proceeded to the Willow Lake Inn in separate cars. They were accompanied by Richard Gary Dickenson, who testified at the appellants' trial. The four (4) police officers left the Willow Lake Inn in Sergeant Blair's car with Blair driving. Dickenson got out of the car at Watterson Expressway and Shelbyville Road after Blair refused to take Dickenson home. After dropping off Dickenson, the three proceeded to the Ramada Inn where Carpenter got his car and followed Borders and Blair to the Rooster Tail Bar on Chestnut Street in downtown Louisville. Sandra Stacey, a dancer at the Rooster Tail, identified the appellants at the Rooster Tail on March 30, 1976, at around 11:00-11:30 p.m. She sat at a table with them where they were having a drink. Following their drinks, the appellants all left together. Stacey testified that following her work and breakfast, she saw the appellant, Blair, at Gargotto's Liquor Store on Jefferson Street between 3:30-4:00 a.m. She told an investigating officer that she also saw the other two appellants, Borders and Carpenter, with Blair at the liquor store. At the trial however she stated that she only saw Blair at the liquor store during that time. Witnesses at Slim's Grill and the Club Cobra

identified the car from which the shootings came as a brown car that looked like an unmarked police car; consequently a teletype was put out for a brown car resembling a police car. Two spent 12-gauge shotgun shells were turned over to the Evidence Technician Unit after being found at the site of the shootings.

Sergeant Pete Giuchici testified that he investigated the shootings at the scene. As he proceeded in a westwardly direction away from the scene, after being advised by witnesses that they heard shots coming from that direction, he noticed a car coming toward him without headlights. Upon stopping the car, which was of a brown color, a voice came from within the car stating, "What's up, Pete?" By voice, Giuchici identified the speaker as appellant, Blair, and stated that there were two other white males in the car, and a 12-gauge shotgun was in the front end of the car. He could not identify the other two individuals. At the trial, Giuchici hedged as to the positive identity of Blair's voice.

A Harrison-Gilroy test for gunpowder residue was performed on Blair's car to determine whether shots had been fired from the automobile. Tests at the Kentucky State Police Crime Laboratory indicated that an unfired shotgun shell found at the Club Cobra had markings similar to the markings on the shells tested in one of Blair's guns.

We believe that the sole issue of merit before the Court is:

WHETHER THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE APPELLANTS?

It is a sound principle of law that a conviction may be sustained on circumstantial evidence. *Rogers* v. *Commonwealth,* Ky., 444 S. W. 2d 548 (1969); *Moore* v. *Commonwealth,* Ky., 446 S. W. 2d 217 (1969). The question then is whether the totality of the evidence was of such a nature that the judge could have concluded that reasonable minds

might fairly find guilt beyond a reasonable doubt. *Carmen* v. *Commonwealth,* Ky., 490 S. W. 2d 744 (1973); *Hodges* v. *Commonwealth,* Ky., 473 S. W. 2d 811 (1971). After a review of the evidence, we cannot say that the evidence is of such a nature and sufficiency to sustain the verdict of the jury.

The crux of the incriminating evidence submitted by the Commonwealth in this case revolves around the evidence that the defendants had recently fired a gun, notwithstanding the evidence that they were in the locality of the time it occurred.

The Commonwealth introduced evidence through an expert witness from the Kentucky State Police Laboratory who performed a Harrison-Gilroy test on the defendant Blair's car to determine whether or not a gun had recently been fired from the car. The purpose of the test is to find evidence of lead and barium which are two principal ingredients of gunpowder. The expert witness who performed the Harrison-Gilroy test testified that standard procedures for this test are as follows: Swabs of the area to be tested are saturated with hydrochloric acid and allowed to dry. Those swabs are sprayed with tartaric acid; then the swabs are sprayed with sodium rhodizonate. If lead is present it reacts with a red color and barium, if present, reacts with an orange color. Hydrochloric acid is again sprayed on the area. Lead then reacts with a blue color and the barium will turn to pink or red. The expert further testified that he had performed over 3,300 Harrison-Gilroy tests. The results of the tests in the present case revealed traces of lead, but no barium.

The admissibility of the Harrison-Gilroy test for discovering gunpowder residue is apparently not well established in Kentucky law. However, in this case, where this scientific test of recognized validity was performed competently under laboratory conditions, we cannot say that

the lower court abused its discretion in admitting the results of the test into evidence. *State* v. *Ross,* Mo., 523 S.W. 2d 841 (1975); *Commonwealth* v. *Sousa,* Mass., 215 N. E. 2d 910 (1966). The test for gunpowder residue in this case, however, was inconclusive at best. The absence of barium in the swabs taken from the defendant Blair's car leaves the jury with only an opportunity to speculate that a gun was actually fired from the defendant Blair's car.

Combined with more conclusive evidence, the Harrison-Gilroy test in question would not be determinative. Here, however, where all the evidence is circumstantial, the lack of conclusiveness of the test leaves the Court with no alternative but to reverse and remand to the lower court on grounds of insufficient evidence, and order that a new trial be granted with directions that if the evidence for the Commonwealth is substantially the same that a directed verdict in favor of the defendants be entered.

ALL CONCUR.

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APPENDIX B

OPINION RENDERED: FEBRUARY 10, 1978
ORIGINAL OPINION WITHDRAWN
AND REISSUED: JUNE 30, 1978
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

CA-568-MR

JEROME BLAIR,
RICHARD CARPENTER, and
STEPHEN BORDERS - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From the Jefferson Circuit Court
Honorable Charles Leibson, Special Judge
Action No. 156577

REVERSING

BEFORE: MARTIN, Chief Judge, COOPER and HOWARD, Judges.
COOPER, Judge. The appellants were convicted in Jefferson Circuit Court on two counts of wanton endangerment and two counts of third degree criminal negligence.

The trial and conviction of the appellants arose out of an incident in the early morning hours in the West End of Louisville, Kentucky, on the 30th and 31st of March, 1976. On that date, Slim's Grill located at 421 South 19th Street, Club Cobra located at 38th and Broadway Streets, and Victory Liquors located at 2600 West Jefferson Street in Louisville were peppered by shotgun fire. Several automobiles parked on the streets in the adjacent areas were

also peppered with the shot. A waitress in Slim's Grill was severely injured with a wound in the head. She suffered brain damage and blindness to the extent of being mentally incompetent and, therefore, was unable to testify at the appellants' trial.

The appellants were police officers for the Louisville Police Department and were off-duty during the night and early morning of March 30th and 31st, 1976. All were indicted in a twelve (12) count indictment.

The testimony of the various witnesses is lengthy and sometimes contradictory, but for the purpose of this opinion a statement of the basic facts will be given.

The appellants, Blair, Borders and Carpenter, left a meeting of the Fraternal Order of the Police at the Ramada Inn on Hurstbourne Lane on March 30, 1976, between 8:30-9:00 P.M. and proceeded, in separate cars, to the Willow Lake Inn. They were accompanied by Richard Gary Dickenson, who testified at the appellants' trial. The four (4) police officers left the Willow Lake Inn in Sergeant Blair's car with Blair driving. Dickenson got out of the car at Watterson Expressway and Shelbyville Road after Blair refused to take Dickenson home. After dropping off Dickenson, the three proceeded to the Ramada Inn where Carpenter got his car and followed Borders and Blair to the Rooster Tail Bar on Chestnut Street in downtown Louisville. Sandra Stacey, a dancer at the Rooster Tail, identified the appellants at the Rooster Tail on March 30, 1976, at around 11:00-11:30 P.M. She sat at a table with them where they were having a drink. Following their drinks, the appellants all left together. Stacey testified that following her work and breakfast, she saw the appellant Blair at Gargotto's Liquor Store on Jefferson Street between 3:30-4:00 A.M. She told an investigating officer that she also saw the other two appellants, Borders

and Carpenter, with Blair at the liquor store. At the trial, however, she stated that she only saw Blair at the liquor store during that time. Witnesses at Slim's Grill and the Club Cobra identified the car from which the shootings came as a brown car that looked like an unmarked police car; consequently a teletype was put out for a brown car resembling a police car. Two spent 12-gauge shotgun shells were turned over to the Evidence Technician Unit after being found at the site of the shootings.

Sergeant Pete Giuchici testified that he investigated the shootings at the scene. As he proceeded in a westwardly direction away from the scene, after being advised by witnesses that they heard shots coming from that direction, he noticed a car coming toward him without headlights. Upon stopping the car, which was of a brown color, a voice came from within the car stating, "What's up, Pete?" By voice, Giuchici identified the speaker as appellant Blair, and stated that there were two other white males in the car, and a 12-gauge shotgun was in the front end of the car. He could not identify the other two individuals. At the trial, Giuchici hedged as to the positive identity of Blair's voice.

A Harrison-Gilroy test for gunpowder residue was performed on Blair's car to determine whether shots had been fired from the automobile. Tests at the Kentucky State Police Crime Laboratory indicated that an unfired shotgun shell found at the Club Cobra had markings similar to the markings on the shells tested in one of Blair's guns.

We believe that the two issues before us are the sufficiency of the evidence and the admission of the results of the Harrison-Gilroy test.

WAS THERE SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT?

It is a sound principle of law that a conviction may be sustained on circumstantial evidence. *Rogers* v. *Common-*

wealth, Ky., 446 S. W. 2d 217 (1969). The question then is whether the totality of the evidence was of such a nature that the judge could have concluded that reasonable minds might fairly find guilt beyond a reasonable doubt. *Carmen* v. *Commonwealth,* Ky., 490 S. W. 2d 744 (1973); *Hodges* v. *Commonwealth,* Ky., 473 S. W. 2d 811 (1971). After a review of the evidence, we cannot say that the evidence is of such a nature and sufficiency to sustain the verdict of the jury.

The crux of the incriminating evidence submitted by the Commonwealth in this case revolves around the evidence that the defendants were in the locality where the offense occurred and that a gun was recently fired in the car.

HARRISON-GILROY TEST RESULTS

The Commonwealth introduced evidence through an expert witness from the Kentucky State Police Laboratory who performed a Harrison-Gilroy test on the defendant Blair's car to determine whether or not a gun had recently been fired from the car. The purpose of the test is to find evidence of lead and barium which are two principal ingredients of gunpowder. The expert witness who performed the Harison-Gilroy test testified that standard procedures for this test are as follows: Swabs of the area to be tested are saturated with hydrochloric acid and allowed to dry. Those swabs are sprayed with tartaric acid; then the swabs are sprayed with sodium rhodizonate. If lead is present, it reacts with a red color and barium, if present, reacts with an orange color. Hydrochloric acid is again sprayed on the area. Lead then reacts with a blue color, and the barium will turn to pink or red. The expert further testified that he had performed over 3,300 Harrison-Gilroy tests. The tesults of the tests in tre present case revealed traces of lead, but no barium.

The admissibility of the Harrison-Gilroy test for discovering gunpowder residue is apparently not well established in Kentucky law. If, however, as was not true in this case, a scientific test of recognized validity was performed competently under laboratory conditions, we cannot say that it was a lower court abuse of discretion to admit the results of the tests into evidence. *State* v. *Ross,* Mo., 523 S. W. 2d 841 (1975); *Commonwealth* v. *Sousa,* Mass., 215 N. E. 2d 910 (1966). The test for gunpowder residue in this case, however, was inconclusive at best. The absence of barium in the swabs taken from the defendant Blair's car leaves the jury with only an opportunity to speculate that a gun was actually fired from the defendant Blair's car.

Combined with more conclusive evidence, the Harrison-Gilroy test could be determinative. Here, however, where all the evidence is circumstantial, the lack of conclusiveness of the test leaves the court with no alternative but to reverse the conviction of these appellants.

The judgment of the circuit court is reversed.

MARTIN, CHIEF JUDGE, CONCURS BY SEPARATE OPINION.

HOWARD, JUDGE, DISSENTS BY SEPARATE OPINION.

MARTIN, CHIEF JUDGE, CONCURRING. I fully concurred with the conclusion of this panel when our original opinion was issued on February 10, 1978. However, in the Commonwealth's petition for rehearing, a new issue has been raised. The purpose of this concurrence is to explain my position in regard to this argument and to answer the dissenting opinion of my associate judge.

The Commonwealth argues in their petition for rehearing that the panel overlooked the decision in *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977), and *Long* v. *Commonwealth,* Ky., 559 S. W. 2d 482 (1977). I do not believe that the panel overlooked either of these decisions.

It is my opinion that either of these decisions is applicable to the present case. The decisions in these cases require that a motion for a judgment of acquittal must be made at the conclusion of all the proof in order for the appellate court to review the sufficiency of the evidence on appeal. In the present case, the record indicates that the defense attorneys did not make a motion for a directed verdict at the conclusion of all the proof. They did test the sufficiency of the evidence in a motion for a new trial.

The argument of the Commonwealth is that under *Kimbrough* and *Long* we are foreclosed from the consideration of the issue of the sufficiency of the evidence as to the guilt of these appellants. I do not believe these decisions were intended to be held retroactively. The decisions in both of these cases were issued after the trial in the present case. As was held in *Pendleton* v. *Pendleton,* Ky., 560 S. W. 2d 538 (1978), retroactivity will not be applied except when a specific dispositive issue was in litigation at the time of the controlling decision.

Furthermore, *Kimbrough* represents a clear departure from prior law in this Commonwealth. Proviously, a question of sufficiency of evidence could have been preserved either by a motion for directed verdict at the close of the Commonwealth's case, or at the close of all the evidence, or even in a motion for a new trial. *See Crain* v. *Commonwealth,* Ky., 484 S. W. 2d 839, 842 (1972); Civil Rule 61.02, made applicable to criminal cases pursuant to Criminal Rule 13.04; *Stone* v. *Commonwealth,* Ky., 456 S. W. 2d 43, 44 (1970).

Inasmuch as *Kimbrough* marks a clear departure from prior law and since appellant could not have had notice of the change, it would be fundamentally unfair to apply this newly created preservation of error rule to the facts and circumstances of this case. Since this procedural change would significantly affect appellant's substantial rights, it

"operates precisely like an *ex post facto* law, such as Art. I §10 of the [federal] Constitution forbids." *Bouie* v. *City of Columbia,* 378 U. S. 347, 353, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). *See also:* Kentucky Constitution, §19.

While I agree that on the sufficiency of evidence issue a motion for a judgment of acquittal at the conclusion of all the evidence would seem to be appropriate, I think that this is a very technical approach to the law. *Kimbrough,* in my opinion, does not supersede principles of due process and certainly in the present case, based on our earlier opinion, it would create a technical deficiency only, rather than a substantive issue. In the present case, certainly the error is the failure of the Commonwealth to prove beyond a reasonable doubt that these appellants committed the offense with which they were charged. The duty of an appellate court to insure that the appellants receive a fair trial cannot be foreclosed by a mere technicality.

It may be that the controlling authorities in this case would be those decisions, such as *Vachon* v. *New Hampshire,* 414 U. S. 481 (1974), in which the United States Supreme Court stated:

> It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. *Id.,* 414 U. S. at 480.

In the present case, the record would appear to lack any relevant evidence to prove the defendants' presence at the scene of the offense.

HOWARD, JUDGE, DISSENTING. I respectfully dissent from the majority in this case. In the first place, the majority opinion should have dealt with the recent case of *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977). The Supreme Court held therein that a motion for directed verdict made only at the close of the Commonwealth's evi-

dence and not renewed at the conclusion of all the evidence does not preserve for review the question of the sufficiency of the evidence to convict. This holding was followed by the Supreme Court in the case of *Long* v. *Commonwealth,* Ky., 559 S. W. 2d 482 (1977). In the case at bar, in the *Kimbrough* case, and in the *Long* case, motions for directed verdict were made at the conclusion of the Commonwealth's evidence and in the case at bar the motions were sustained as to several counts of the indictments. However, in all three of these cases no motions were made at the conclusion of all the evidence and, therefore, the alleged errors were not preserved for review on appeal. In *Kimbrough* and *Long* the convictions were affirmed, and I think we should do likewise in this case.

In addition, there was sufficient evidence to convict, in my opinion, even in the absence of the evidence in regard to the Harrison-Gilroy test. In view of the fact that it was admitted that shots had been fired from Blair's car on a hunting trip, it does not appear that the test would be too important anyway. It was for the jury to determine the reason guns were fired from Blair's car.

There was, of course, conflicting evidence with some of the Commonwealth's witnesses changing their testimony, but the evidence of their prior inconsistent statements was entitled to be submitted to the jury as substantive evidence. *Jett* v. *Commonwealth,* Ky., 436 S. W. 2d 788 (1960).

If, under the evidence as a whole, it would not be clearly unreasonable for the jury to find the defendants guilty, they are not entitled to a directed verdict of acquittal even if the motions had been properly made. *Trowel* v. *Commonwealth,* Ky., 550 S. W. 2d 530 (1977). There was sufficient evidence of probative value to sustain the convictions.

I would affirm the judgment of the lower court.

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APPENDIX C

RENDERED: JUNE 12, 1979

SUPREME COURT OF KENTUCKY

78-SC-365-DG

COMMONWEALTH OF KENTUCKY - - - *Movant*

v.

JEROME BLAIR,
RICHARD CARPENTER, and
STEPHEN BORDERS - - - - - *Respondents*

On Review from the Court of Appeals
CA-568-MR
(Jefferson Circuit Court No. 156577)

MEMORANDUM OPINION PER CURIAM—AFFIRMING IN PART; REVERSING IN PART

This case involves an incident in the early morning hours of March 31, 1976, in which two establishments in Louisville's West End, Slim's Grill (19th and Cedar) and Club Cobra (38th and Broadway), were peppered with gunfire from a moving car. Lubertha Pugh, a waitress at Slim's Grill, was seriously injured by the gunfire, sustaining brain damage and blindness. Respondents Blair, Carpenter and Borders, three Louisville police officers, were found guilty of two counts of wanton endangerment and two counts of third-degree criminal mischief and sentenced to imprisonment for one year. The judgments of the Jefferson Circuit Court were reversed by a divided

panel of the Court of Appeals, which held that the evidence was not sufficient to support the convictions. We granted discretionary review.

We begin with a summary of the facts based upon our review of the record. Blair, Borders and Carpenter attended an FOP meeting at Ramada Inn (I-64 and Hurstbourne Lane) on the night of March 30. Accompanied by Officer Dickinson, respondents left the meeting about 8:30 and went to the Willow Lake Inn (La Grange Road near Anchorage), taking Blair's and Borders' cars. After about and hour the four left in Blair's car. Dickinson was dropped off at Shelbyville Road and Watterson Expressway around 11:00. Respondents then drove back to Ramada Inn, where Carpenter picked up his car and followed Blair and Borders downtown to the Rooster Tail (Chestnut Street). Sandra Stacy, a dancer at the Rooster Tail, saw the trio arrive between 11:00 and 11:30 and sat with them as they drank beer. Respondents left between 12:30 and 1:00 a.m.

The shooting at Slim's Grill occurred about 1:15; the Club Cobra shooting followed about 1:30. A police teletype was put out for a brown car resembling a police car that was seen leaving the scene at Club Cobra. Sgt. Pete Giuchici was investigating the Slim's Grill shooting when the Club Cobra call came on the radio. He headed west in the direction of Club Cobra and spotted a car traveling toward him with its headlights off. Giuchici stopped the oncoming car, and the front-seat passenger said, "What's up, Pete?" Giuchici identified the voice as that of respondent Blair. Giuchici also observed two unidentified white males and a shotgun in the car.

Betty Houchins, Blair's girl friend, told the grand jury that Blair told her he was stopped in the West End. At trial, however, she testified that Blair told her the police said he was stopped in the West End. In addition, Sgt. Browder, who investigated the case against respondents,

testified that Blair had mentioned in a conversation with him that he had a legitimate reason for being in the West End. Blair denied making the statement.

An expert who performed a Harrison-Gilroy test on Blair's car found traces of lead, but no barium or antimony. He testified that the results were consistent with the discharge of a firearm, close proximity of a firearm, or having held a firearm not recently cleaned. A number of police officers testified that they had shot groundhogs from Blair's car. Another expert expressed his opinion that a spent .12-gauge shotgun shell found near Club Cobra had been chambered in, but not fired from, a shotgun owned by Blair.

Sandra Stacy told investigating officers that she saw Blair at Gargotto's, a downtown (Second and Jefferson) liquor store on her way home from work between 3:30 and 4:00 and that he got into a dark car in which his two companions from the Rooster Tail were sitting. At trial, however, she testified that Blair was definitely alone when she saw him.

Borders testified that he left the Rooster Tail with Blair and went to the Fish Bowl (1700 Preston). They left between 1:00 and 1:30, and Blair drove him back to the Willow Lake Inn to get his car. During the investigation Borders told Sgt. Browder that he passed out in his car and never left the Willow Lake Inn. At trial Borders explained that he lied to Browder at the time because he didn't want his wife to know he had been at the Rooster Tail.

Blair testified that he left the Rooster Tail with Borders, went to the Fish Bowl, took Borders to the Willow Lake Inn, returned downtown to buy beer at Gargotto's, and went to Betty Houchins' apartment where he slept on the couch.

Carpenter testified that he went home after leaving the Rooster Tail. Officer Warman, who lived in the same apartment building as Carpenter, told the jury that he borrowed some records from Carpenter between 1:00 and 2:00.

The Commonwealth argues on this appeal that there was sufficient evidence to convict respondents, and that in any event the issue was waived by the failure of respondents to move for a directed verdict at the close of all the evidence, citing *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977).

The Supreme Court of the United States has held that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. *Vachon* v. *New Hampshire,* 414 U. S. 478, 480 (1974). We are of the opinion that the record before us contains no relevant evidence linking Carpenter and Borders to the charged offenses. It follows that their convictions amounted to a denial of constitutional rights which could not be waived under *Kimbrough.* The Court of Appeals correctly ruled that the evidence was insufficient to convict Carpenter and Borders.

The Court of Appeals erred, however, with respect to Blair. Blair was identified in the vicinity of the shootings shortly after they occurred in a car with its lights off which contained a shotgun. The record contains relevant evidence against Blair, and *Vachon* is therefore inapplicable. *Kimbrough* forecloses Blair from raising the sufficiency of the evidence before an appellate court.

That part of the opinion of the Court of Appeals reversing the convictions of Carpenter and Borders is affirmed. That part of the opinion dealing with Blair is reversed, thereby affirming the judgment of the Jefferson Circuit Court against him.

All concur.

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APPENDIX D

SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY, - - - *Movant,*

v.

JEROME BLAIR,
RICHARD CARPENTER and
STEPHEN BORDERS, - - - - - *Respondents.*

OPINION

Nov. 20, 1979.
Rehearing Denied Feb. 12, 1980.

Defendants were convicted before the Jefferson Circuit Court on two counts of wanton endangerment and two counts of third-degree criminal mischief, and they appealed. The Court of Appeals reversed, holding that the evidence admitted at trial was insufficient to support the jury's verdict, and a petition for discretionary review was granted. The Supreme Court affirmed as to two respondents but reversed with respect to the third. Upon granting petitions for rehearing, the Supreme Court, Clayton, J., held that under the *Kimbrough* rule, defendants failed to preserve for appellate review the issue of sufficiency of the evidence where they failed to move for a directed verdict at the close of all the evidence.

Opinion of Court of Appeals reversed; judgments of conviction affirmed.

1. Criminal Law—Key 1044.1(7)

In order for the issue of the sufficiency of the evidence to be preserved for appellate review, the party wishing to use insufficiency as a basis for his appeal must have moved

for a directed verdict at the close of all the evidence, not just at the close of the Commonwealth's case-in-chief.

2. **Criminal Law—Key 1044.1(7)**

If there has been no motion for a directed verdict at the close of all the evidence, it cannot be said that the trial judge has ever been given an opportunity to pass on the sufficiency of the evidence as it stood when finally submitted to the jury.

3. **Criminal Law—Key 1044.1(7)**

Insufficiency of the evidence to support a verdict must be timely raised in the trial court, ordinarily by a motion for a directed verdict, in order for the question to be reviewable on appeal.

4. **Criminal Law—Key 1044.1(7)**

Under the *Kimbrough* rule, defendants failed to preserve for appellate review the issue of sufficiency of the evidence where they failed to move for a directed verdict at the close of all the evidence.

5. **Courts—Key 89**

Judicial consistency must be observed in order to maintain a responsible and efficient court system.

Robert F. Stephens, Atty. Gen., Martin Glazer, Asst. Atty. Gen., Frankfort, for movant.

John Tim McCall, Louisville, for respondent Blair.

Frank E. Haddad, Jr., Louisville, for respondent Carpenter.

Robert E. Fleming, Louisville, for respondent Borders.

CLAYTON, Justice.

Over three years ago, respondents, Blair, Carpenter and Borders, Louisville police officers at the time, were convicted of two counts of wanton endagerment and two counts of third-degree criminal mischief and sentenced to one year's imprisonment. The Court of Appeals reversed the

convictions, holding that the evidence admitted at trial was insufficient to support the jury's verdict. This court granted the Commonwealth's petition for discretionary review and in an opinion issued last June, affirmed the decision of the Court of Appeals as to respondents Carpenter and Borders but reversed that court's decision with respect to respondent Blair.

Petitions for rehearing were submitted by both sides and after careful consideration we now find it necessary to completely reverse the decision of the Court of Appeals and to uphold the judgments of the Jefferson Circuit Court.

[1–3] We rely substantially on two recent cases, *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977) and *Rudolph* v. *Commonwealth,* Ky., 564 S. W. 2d 1, *cert. denied,* 439 U. S. 1004, 99 S. Ct. 616, 58 L. Ed. 2d 680 (1978). The procedural rule, as clarified in *Kimbrough,* is that in order for the issue of the sufficiency of the evidence to be preserved for appellate review, the party wishing to use the insufficiency as a basis for his appeal must have moved for a directed verdict at the close of all the evidence, not just at the close of the Commonwealth's case in chief. The rationale behind this rule being that: "If there has been no motion for a directed verdict at the close of all the evidence, it cannot be said that the trial judge has ever been given an opportunity to pass on the sufficiency of the evidence as it stood when finally submitted to the jury." *Kimbrough,* 550 S. W. 2d at 529. Furthermore, "[w]e have held consistently that insufficiency of the evidence to support a verdict must be timely raised in the trial court—ordinarily by a motion for a directed verdict . . . in order for the question to be reviewable on appeal. *Rudolph,* 564 S. W. 2d at 4. *See e. g., Long* v. *Commonwealth,* Ky., 559 S. W. 2d 482 (1977) and *Butler* v. *Commonwealth,* Ky., 560 S. W. 2d 814 (1977).

[4, 5] Since respondents failed to move for a directed verdict at the close of all the evidence, the *Kimbrough* rule must be applied as we perceive no reason to retract from this position. We must remain firm in our adherence to specified procedure because "an appellate hearing is conditioned upon compliance with essential rules, without which this Court could not effectively conduct its business. It is our duty to enforce those rules as a part of the judicial process . . . ." *United Mine Workers of America* v. *Morris,* Ky., 307 S. W. 2d 763, 766 (1957). Judicial consistency must be observed in order to maintain a responsible and efficient court system.

The opinion of the Court of Appeals is reversed, and the judgments of conviction for all three respondents are affirmed.

All concur.

APPENDIX E

OPINION RENDERED: NOVEMBER 20, 1979

SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY

v.

JEROME BLAIR
RICHARD CARPENTER and
STEPHEN BORDERS

File No. 78-SC-365-DG

Appeal from Jefferson Circuit Court
Action No. 156577

MANDATE

The Court being sufficiently advised, it is therefore considered that the decision of the Court of Appeals is reversed, and the judgments of conviction for all three respondents are affirmed; which is ordered to be certified to said court.

February 12, 1980 Respondents' Petition for Rehearing Denied.

A Copy—Attest:
(s) Rose Tomlinson, D. C.
John C. Scott, Clerk

Issued 2/12/80

79-1798

Supreme Court, U. S.
FILED
JUL 3 1980
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1979

JEROME C. BLAIR - - - - - Petitioner

versus No. 79-1795

COMMONWEALTH OF KENTUCKY - Respondent

RICHARD CARPENTER and
STEPHEN BORDERS - - - - Petitioners

versus No. 79-534

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for Writ of Certiorari to the
Supreme Court of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

October Term, 1979

JEROME C. BLAIR - - - - - *Petitioner*

v. **No. 79-1795**

COMMONWEALTH OF KENTUCKY - - *Respondent*

RICHARD CARPENTER and
STEPHEN BORDERS - - - - *Petitioners*

v. **No. 79-534**

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

RESPONDENTS BRIEF IN OPPOSITION

OPINIONS BELOW

As set out in petitioners' Petition and attached thereto in Appendix.

JURISDICTION

All petitioners assert jurisdiction pursuant to 28 U.S.C. Section 1257(3). However, Supreme Court Rule 19(1)(a) authorizes a review on writ of certiorari "Where a state court has decided a federal question of substance . . . or has decided it in a way probably not in accord with applicable decisions of this court."

It should be noted from the petitioners' appendices that the Supreme Court of Kentucky (Decision, November 20, 1979, Rehearing Decision, February 12, 1980) did not address the federal constitutional question, but decided the issue on state procedural law only. On that basis, respondent asserts that no federal question is applicable to which this Court should assume jurisdiction.

QUESTIONS PRESENTED

I.

Whether the Facts Have Mooted the Issues as They Apply to Petitioner Blair.

II.

Whether Kentucky Law Requiring a Motion for a Directed Verdict in Order to Review a Claim of Insufficiency of Evidence to Convict Violates the Constitution of the United States.

III.

Whether There *Was* Sufficient Evidence to Convict.

CONSTITUTIONAL PROVISIONS

As set out in the petition.

STATEMENT OF THE CASE AND FACTS

Petitioner, Jerome C. Blair, was tried together with Richard Carpenter and Stephen Borders in the Jefferson Circuit Court (Louisville, Kentucky) on a 12 count indictment, including first-degree assault (KRS

508.010) wanton endangerment (KRS 508.060), third-degree criminal mischief (KRS 512.040) and first-degree criminal mischief (KRS 512.020). The trial court dismissed some of the counts and the jury found all three defendants not guilty of one count. All three were found guilty of wanton endangerment and criminal mischief, third-degree. The total sentences of each defendant is one year in the penitentiary. Blair, after his appeal was decided by the Kentucky Court of Appeals, voluntarily entered prison, was discharged by parole December 17, 1979. His maximum expiration date of sentence is July 8, 1980 (and may have expired by the time the petition is reviewed by this Court). See attached certified record of the Kentucky Bureau of Corrections, Department of Justice. Carpenter and Borders are still free on bond pending determination of their petition in this Court.

All three petitioners appealed to the Kentucky Court of Appeals. That Court originally issued a single opinion reversing the convictions on the basis of insufficient evidence. (Petitioner's Appendix A.) On petition for rehearing, that Court withdrew the original opinion and issued a new opinion containing a majority opinion, a concurring opinion and a dissenting opinion (Petitioner's Appendix B.) The Commonwealth moved for discretionary review in the Supreme Court of Kentucky (similar to certiorari in this Court), which was granted. That Court issued an unpublished opinion affirming as to Carpenter and Borders and reversing as to Blair (Petitioner's Appendix C), but on Petition for Rehearing, withdrew

its original opinion and reversed as to all defendants (Petitioner's Appendix D). As a result of the last opinion, all three defendants now stand convicted per the original circuit court judgment and all three have filed petitions for writs of certiorari in this Court.

FACTS

In the early morning hours of March 30-31, 1976, two restaurants and bars in Louisville's West End known as Slim's Grill and Club Cobra were peppered with gunfire from a moving car. A waitress in Slim's Grill was seriously injured by the gunfire, sustaining brain damage and blindness. Several vehicles parked in the general area and a liquor store were riddled by gunfire, also. Blair, Carpenter, and Borders were three Louisville Police Officers who were off duty during the night in question.

Police officers investigated the shootings. A Sergeant Pete Giuchici, while investigating the Slim's Grill shooting, received a radio call of another shooting at Club Cobra. He headed in the direction of the Club Cobra, having been told by bystanders that shooting was then going on in the westerly direction. He spotted a car driving with its headlights off. He blocked its path and upon approaching the vehicle heard a front seat passenger say, "What's up, Pete?" He identified the voice as that of Blair. Two other unidentified white males were in the vehicle and there was a shotgun in the car. He believed they seemed familiar and were police officers, but he could not posi-

tively identify them. Considering the incident odd, he reported it to his superiors and an internal police investigation was begun. Also, the Louisville Homicide Squad was investigating.

Found at the scene of one of the bars where the shooting occurred were two spent shotgun shells. One of the shells was retained by Sergeant Giuchici but not marked or preserved for evidence. He placed the shell in his desk or cabinet. According to him, it later disappeared and was never recovered. The other shell had been properly marked and turned over to the members of the homicide detail.

In the meantime, police sought to question Blair re his appearance in the West End during that night (while off duty). He agreed to meet with investigators at his attorney's office. When the police appeared at the attorney's office to question him, they noted Blair's car in the parking lot. The car appeared to be of similar color and description given out by bystanders who glimpsed the vehicle from which the shots emanated.

A Sergeant Browder investigated the case. Blair had told him that he, Blair, had a legitimate reason for being in the West End of Louisville. Blair's car was tested by a Harrison-Gilroy test for gunpowder residue. The expert indicated evidence of lead, but no barium or antimony in the tested swabs. He explained this absence by the fact that different gunpowder manufacturers used different formulae in making powder and if more lead was present, that ratio might overshadow evidence of barium or antimony as to ob-

scure their appearance in a chemical test. It was his opinion, however, that the test indicated guns had been fired from the car.

Blair explained the presence of gunpowder with the contention he had shot "groundhogs" from his car several times.

Blair and other police officers were required to turn over weapons they had. The one shell found at the scene had markings indicating that it had once been chambered and extracted from one of Blair's guns, but was not shot from *that* gun. The firing pin mark on the shell was different from the mark made by the gun Blair had turned over to the police for testing, but the extractor marks matched those from the tested gun.

A Betty Houchins, Blair's girlfriend, told the Grand Jury that Blair had told her he was stopped in the West End.

In further investigation, police talked to a Sandra Stacey, a dancer in a downtown bar called the Rooster Tail. She had seen Blair, Carpenter, and Borders in the Rooster Tail until about 11 or 11:30 and had sat at their table. When she went home, across the river in Indiana, she told investigators that she saw all three officers at Gargotto's Liquor Store about 3 a.m. (Blair was coming out and the other two officers were in the car.)

However, at trial, she denied saying she saw Carpenter and Borders and only admitted seeing Blair.

Sergeant Browder, in further investigating the incident, interviewed an officer Dickinson. Dickinson told him that Blair, Borders, Carpenter, and Dickin-

son had attended an FOP meeting at Ramada Inn and had drunk beer there. All four then went to a tavern called Willow Lake in Anchorage (suburb of Louisville) where they drank more beer and played pool. Blair, Carpenter, and Borders decided to go downtown to the Rooster Tail, but Dickinson who had to work the next day wanted to be taken home. (He had no transportation and had come to the FOP meeting with one of the other officers.) Blair, the driver, refused to take Dickinson home. He was abandoned on the Watterson Expressway. He called his wife, who took him home.

Blair admitted being at the Rooster Tail with the other two men ,Carpenter and Borders), but said that he and Borders went to another bar, called the Fish Bowl, on Preston Street (many miles from the West End) and was there about the time of the shootings in the West End. No one testified to seeing them at the Fish Bowl.

Carpenter testified he went home around 11:30 from the Rooster Tail and borrowed some phonograph records from a neighbor in his apartment building (the neighbor was another police officer) around the time of the shootings.

Borders originally told investigating officers that he had passed out at the Willow Lake Tavern in his car and woke up around 3 a.m. and went home, but upon being confronted with the statements of the other officers that he had left Willow Lake and gone downtown to the Rooster Tail, he admitted lying, but explained his reasons as fear that his wife would find out about his escapade downtown. He testified that he

went downtown to the Rooster Tail, left with Blair for Preston Street at the Fish Bowl, returned to his car at Willow Lake Tavern, passed out, woke up at 3:30 or 4 a.m., and went home.

All three defendants denied at trial being in the West End during the shootings there.

The defendants filed a motion for a directed verdict at the close of the Commonwealth's evidence, which was denied. They then put on evidence by their own testimonies and testimony of witnesses, such as alibi witnesses, and those who testified to having shot "groundhogs" from Blair's car. THEY DID NOT MAKE MOTIONS FOR DIRECTED VERDICTS AT THE CLOSE OF ALL THE EVIDENCE.

REASONS FOR DENYING THE WRIT

I.

Blair's Petition Is Now All But Moot.

II.

There Are No Constitutional Issues Present, Only a Legitimate Application of State Law.

III.

There Was Sufficient Evidence Upon Which Petitioners Could Be Convicted by a Jury and Which Meet Constitutional Standards.

I.

Blair's Petition Is All But Moot.

After Blair's appeal to the Court of Appeals and while the case was pending on a motion for discretionary review to the Supreme Court of Kentucky, Blair voluntarily surrendered himself to begin service of his one-year penitentiary sentence. He was paroled on December 17, 1979, and the maximum expiration date of his sentence is July 8, 1980. Assuming he does not violate the terms of his parole, he cannot be reincarcerated for the present crime after that date. See attached certificate of Bureau of Corrections.

By the time this Court may review his petition filed herein, the sentence will have already been served, either in prison or on parole. Should this Court decide to grant the petition and order a new trial or free him for lack of evidence, the Commonwealth could not make Blair serve any additional time. In short, the matter

of his sentence and incarceration will be moot. To grant the writ under such circumstances will be an empty gesture. On this ground alone, Blair's petition should be denied.

II.

There Are No Constitutional Issues Present, Only a Legitiate Application of State Law.

All three petitioners, Blair, Carpenter, and Borders assert that the Kentucky Supreme Court applied its procedural rules retroactively and in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Blair asserts that such procedural application is retroactive and in violation of constitutional prohibitions against the enactment of ex post facto laws in violation of Article I, sections 9 and 10.

The Supreme Court of Kentucky, in its final opinion, determined that it would not review the issue of the sufficiency of the evidence against any of the three petitioners here because none of them made a motion for a directed verdict at the close of all the evidence in the light of that Court's ruling in *Kimbrough* v. *Commonwealth,* Ky., 550 S .W. 2d 525 (1977).

> In that case, the Kentucky Supreme Court stated:
> "A motion for a directed verdict made at the close of the plaintiff's (here the Commonwealth's) case is not sufficient to preserve error unless renewed at the close of all the evidence, because once the defense has come forward with its proof, the propriety of a directed verdict can only be tested in

> terms of *ALL* the evidence. If there has been no motion for a directed verdict at the close of all the evidence, it cannot be said that the trial judge has ever been given an opportunity to pass on the sufficiency of the evidence as it stood when finally submitted to the jury. In effect, therefore, a motion for directed verdict made only at the close of one party's evidence loses any significance once it is denied and the other party by producing further evidence, chooses not to stand on it." (550 S. W. 2d at 529)

Here, all petitioners, Blair, Borders, and Carpenter put on additional evidence when their original motions for directed verdict made at the close of the Commonwealth's direct evidence were denied. Blair testified as to where he went during the night and early morning of March 30-31, 1976. He testified he had shot guns from his car at groundhogs (this was to explain the evidence of gunpowder residue on his vehicle). He put on other officers who testified they had gone groundhog hunting with him.

Borders testified he had passed out in his car at Willow Lake Tavern in Anchorage and could not have been in the West End of Louisville. Carpenter testified he went home from the Rooster Tail bar and listened to phonograph records with his girlfriend and borrowed some records from a neighbor police officer. That officer also testified.

A great deal of evidence was put on after the initial motions for directed verdict.

All petitioners complain that the Kentucky Court's application of law in *Kimbrough, supra,* was a sur-

prise and a retroactive application to their case (they were tried June 28, 29, 30, July 1, 2, 1976; *Kimbrough's* opinion was first rendered April 1, 1977), that such application was ex post facto.

First of all, we need point out that Article 1, Section 9, provides, in part, that "No . . . ex post facto law shall be passed" and Section 10 provides, in part, "No state shall . . . pass any . . . ex post facto law. . . ."

The Constitutional provisions aforesaid were pointed to the Legislative bodies (Congress or a state legislature), not to its courts. But we are aware that this Court has, by judicial interpretation, precluded a state court from achieving the same end via *Bouie* v. *City of Columbia,* 378 U. S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964).

But, we submit that the Kentucky Supreme Court's rule in *Kimbrough, supra,* was not an ex post facto application of law, or was not new. It merely reiterated prior law on the subject.

For, as early at 1928 in *Delong* v. *Commonwealth,* 225 Ky. 461, 9 S. W. 2d 136, and in *Harvey* v. *Commonwealth,* Ky., 423 S. W. 2d 535, 537 (1968), the appellate court dealt with the issue.

The *Kimbrough* ruling was certainly not new law as far as federal courts were concerned. For example, it was utilized in *United States* v. *Black,* 525 F. 2d 668, 669 (6th Cir., 1975), and even this court considered the matter in *United States* v. *Colderon,* 75 S. Ct. 186, 348 U. S. 160, 99 L. Ed. 2d 202 (Ariz., 1954) where, in a footnote, the Court noted that:

> "[B]y introducing evidence, the defendant waives his objection to the denial of his motion to acquit [citing cases]. His proof may lay the foundation for otherwise inadmissible evidence in the Government's initial presentation . . . or promote corroboration or essential elements of the Government's case. . . ."

So, petitioners cannot twist EX POST FACTO to cover the facts in these cases. *Kimbrough* was not new law, but a reaffirmation and a rephrasing of prior, existing law.[1]

Carpenter and Borders argue that the Kentucky Supreme Court's reliance on *Kimbrough* for its refusal to consider the sufficiency of the evidence is a restrictive, too technical approach to an issue of constitutional proportions, that issue being that a person may not be convicted except upon good and sufficient evidence.

As supportive of their contention that the Court should consider certiorari, they cite *In Re Winship*, 397 U. S. 358 (1970), and *Jackson* v. *Virginia*, —— U. S. ——, 61 L. Ed. 2d 560 (1979). However, we submit that neither of those cases reached or dealt

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[1]Kentucky Criminal Rule (RCr) 9.54(2) provides: "No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection."

This provision was in effect as of March 1, 1974, two years before petitioners' trial.

A motion for a directed verdict after all the evidence has been introduced is a motion for a peremptory instruction to the jury. So *Kimbrough* did not *create* law. The law was already there.

with the issue here presented. They were concerned with the quantum of evidence necessary to convict a defendant in a criminal case for constitutional purposes.

But, here the issue is—did these petitioners preserve the question of the quantum of evidence by not properly raising the issue in the trial court?

Implicit in their argument is the belief that the question concerning the quantum of evidence necessary to convict must *always* be available and must *always* be considered by an appellate court regardless of what transpired procedurally in the trial court, that an appellate court is *always required* to consider such an issue, whether it has been procedurally preserved or not, as a matter of original jurisdiction. And, why does such an issue preclude any procedural foreclosure to its consideration? Because it is *constitutionally* impermissible to convict a defendant on less than sufficient evidence (in the minds of petitioners).

Thus, distilled to its barest essentials, that is what we understand to be all petitioners' positions.

But, the fact that it is alleged that an issue raised has constitutional import does not preclude the necessity of preserving the issue properly. After all, every case filed in this Court, via certiorari, alleges that a constitutional issue is present. Without the allegation of such an issue, this Court would lack jurisdiction to consider it.

There are many constitutional rights, the right to counsel, the right to trial by jury, the right of confrontation of witnesses. Each of these rights can be waived by failure to present the issue, either by motion

or objection. The right to appeal (if a state affords an appeal) can be waived by failure to take the necessary action prescribed by rule or statute for effectuating such an appeal.

Every one of these constitutional rights involve the application of an orderly rule procedure for presenting those issues to a court.

The issue of whether a constitutional right must be considered by a state court despite failure to preserve the issue at the trial level has been considered by this Court in *Wainwright* v. *Sykes,* 433 U. S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977). In that case, *Sykes* challenged a confession which was admitted at trial as in violation of *Miranda* v. *Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, but his challenge did not occur contemporaneous to the trial or at the time the inculpatory statements were introduced in evidence. He did not object until he filed a motion to vacate his conviction and failed there. He then filed a federal habeas corpus action pursuant to 28 U.S.C. Sec. 2254.

Although this case does not arise via habeas corpus, but appears via certiorari, the rationale as set out in *Wainwright* is still applicable here.

A "contemporaneous objection" rule permits the objection (or motion, as in the case here) to be made when the matter is freshest, not years later. It permits the trier of fact, the trial court, to consider and perhaps reject insufficient evidence precluding the necessity of an appeal or a collateral action at a later time.

The state trial should be the "main event" rather than a "tryout on the road." For, if a defendant can

ignore the procedural requirements, and wait until the appeal or until a collateral action is filed, it reduces the trial to a minor "bit player" in the judicial march to final determination of criminal justice.

On appeal, the defendant can ignore the trial court and request the appellate court to consider what it did not ask the trial court to consider. How can the appellate court determine that the trial court was in error, or abused its discretion, when the trial court was not given the opportunity to make the proper decision in the first place?

So, there is more than mere unnecessary procedural rules here. The rules requiring that for an appellate court to consider the sufficiency of the evidence, there must be a motion attacking such evidence after all the evidence is in, has a salutary and important state purpose.

That purpose is to provide an orderly, proper method for a trial judge to determine, before the case has finally been submitted for jury decision, to evaluate whether it should be submitted in the first place. For, if the judge can determine that evidence is insufficient, there will be no need to go farther and clog the judicial machinery with an expensive, time-consuming, and unnecessary jury decision which could be reversed upon appeal. Such a motion properly filed and ruled upon frees the defendant from further trial. He is set free immediately.

However, if a defendant can bypass the procedural rule requirement, why make it or require it in the first place? If the courts determine that it is unnecessary

to use the rule, defendants will not bother to preserve the issue or use the rule. They can await a guilty verdict and then only on appeal, or collaterally via habeas assert the claim. Such a determination can only result in what *Wainwright* seeks to prevent, a dilution of the importance of the initial trial, the trial court, and the trial judge.

So, we submit that there are no constitutional issues which justify the granting of a writ of certiorari; there are only state procedural issues, the failure to preserve a contention on appeal by a proper motion contemporaneously at the trial level. A state's highest court may require as a matter of state law that in determining whether it will review an issue, that issue must first be preserved by proper motion at the trial level.

And, it may do so, even though the issue allegedly is one of constitutional import. If it cannot require that, we will eventually have to abandon state courts and state judicial determinations and require all trials to emanate from the federal courts.

For, it follows as night follows day, that if this Court determines that constitutional issues can be reviewed and considered despite failure to preserve the issues asserted contemporaneously and in the manner prescribed by state law, that all issues will become constitutional issues (or at least asserted to be constitutional issues) in order to bypass the failure to use proper state rules for reaching the issue by the state judiciary.

Therefore, we submit there is no constitutional issue deserving of the granting of writs of certiorari to these

petitioners. They are asking this Court to do what they did not ask the state trial court to do, when they should have asked it.

III.

There Was Sufficient Evidence Upon Which Petitioners Could Be Convicted by a Jury and Which Meet Constitutional Standards.

Petitioner's basic argument, after dealing with the preservation issue, is that there was insufficient evidence upon which a "trier of fact could have found the essential elements of the crime beyond a reasonable doubt" as iterated in *Jackson* v. *Virginia, supra.*

This is the evidence against them:

1. A series of shootings were occurring in the West End of Louisville on March 30-31, 1976, in which two black bars, a liquor store, and several automobiles were shot into.

2. At one of the bars, a waitress was hit in the brain, the shot causing her blindness and mental incompetency.

3. While investigating the shooting in one bar and receiving a call of a shooting occurring then at another bar several streets away, bystanders told Sergeant Giuchici (one of the investigating officers) they heard shots right then down Magazine Street. He proceeded in the direction of the sound, saw a car with its lights off coming toward him. The car had a similar description to that given by bystanders as appearing to be a brown, unmarked police car.

4. He stopped the car and recognized Blair who said to him, "What's up Pete?" He noticed two other white males in the car and a shotgun in the front seat.

5. Upon further thought, he checked Blair's duty roster and found out he (Blair) was off duty that night (and should not have been in the vicinity at the time).

6. A spent shotgun shell found in the street of one of the bar shootings was determined to have been extracted (from expert ballistic testimony) from a shotgun turned over for testing by Blair, but had not been shot from that gun (the firing pin mark came from another gun not turned over for testing). The gun that shot the shell was not recovered for testing, but the shell had once been in a gun belonging to Blair, and that shell was connected directly to the shooting incident.

7. The next day, Blair called to advise his superiors (while off duty) that he was available for questioning at his attorney's office.

8. The police went there and saw his car (brown with similar description to the vehicle which had been seen from which the shots came and similar to the one he was seen in by Sergeant Giuchici). They requested permission to search and took the car to police headquarters because it was beginning to rain. It was there that swabs treated with chemical material were taken of various portions of the car.

9. Experts testified the swabs indicated positive for lead (but not antimony or barium) sufficient in the expert's opinion to be evidence that gunpowder had been on the car (Harrison-Gilroy test).

10. Blair told Sergeant Browder while with his attorney, that he had a good reason to be there (the West End). At trial, he denied making this statement or of being in the West End.

11. Blair's girlfriend told the grand jury that when she awoke on March 31, 1976, Blair was sleeping on her couch and told her he had been stopped in the West End.

12. All three men, Blair, Borders, and Carpenter, were together at Ramada Inn at an FOP meeting up to about 8-8:30 p.m. on March 30, 1976.

13. All three and another (Dickinson) went to Willow Lake Tavern. They were seen together.

14. Dickinson testified they intended to go down town (the West End was within 2-3 miles of downtown) to the Rooster Tail Bar. He was abandoned at Watterson Expressway; the other three were still in the car.

15. All three—Blair, Borders, and Carpenter—were drinking together downtown in the Rooster Tail. One of the trio had called police on duty to look into some underage boys who were attempting to be served alcohol in the Rooster Tail and were creating a disturbance.

16. The police radio had the call monitored and noted.

17. All three left the Rooster Tail about 11-11:30 p.m., March 30, 1976.

18. A go-go dancer (Sandra Stacey) told investigating officers, as she was going home across the bridge to Indiana, she saw Blair *with* Carpenter and Borders

about 3:30 a.m., on March 31, 1976. Blair was coming out of Gargotto Liquor Store and entering his car containing the other two men (Borders and Carpenter) that she saw earlier that night at the Rooster Tail. However, at trial, she denied making the statement, that she only saw *Blair*.

19. Borders lied to investigating officers, and said he had passed out at Willow Lake Tavern when the other three (Carpenter, Blair, and Dickinson) had left. Dickinson said they left together. Borders was seen at the Rooster Tail. He then admitted it was a lie and that he did go to the Rooster Tail, but left with Blair to go to Preston Street to the Fish Bowl (no one testified to seeing either of them there).

So, there is evidence Blair was in the vicinity of the shootings when they occurred in suspicious circumstances. His car was similar in appearance to the car seen from which shots came. A shell found at the scene had been in his gun. There was fresh evidence the day after the shooting that gunpowder had been shot from his car. He had been with the other two officers both before and after the time of the shooting and he had been seen with two other white men in a car at the scene of the shooting.

All of these bits of evidence were individual bricks which unerringly pointed to petitioners' guilt. A single brick, by itself, does not make a structure, but when placed together with other single bricks in proper juxtaposition make a house, a store, or an impressive building.

With the evidence presented, including the petitioners' denials (which the jury was not required to believe) "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia, supra.*

So, despite these petitioners' contentions, there was presented evidence of their guilt sufficient to meet the requirements of the Constitution. They were lucky that the jury (who also determined their punishment) was as lenient as it was and gave them only one year imprisonment, considering the seriousness of the injuries they created by their criminal activity.

There are no constitutional issues worthy of consideration by this Court, only a proper determination by a state court of state law. The petitions should be denied.

Respectfully submitted,

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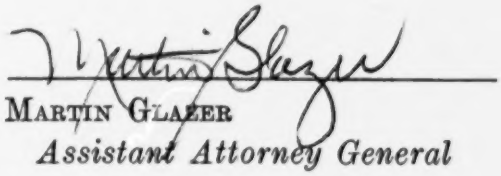
PROOF OF SERVICE

I, Martin Glazer, counsel for the Respondent, hereby certify that three (3) copies of the foregoing Respondent's Brief in Opposition were mailed, postage prepaid, this 30th day of June, 1980, to Hon. John Tim McCall, 200 Hart Block Building, 730 West Main Street, Louisville, Kentucky 40202, Counsel for Petitioner, Jerome C. Blair; Hon. Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, Kentucky 40202 and Hon. Robert E. Fleming, 1509 Citizens Plaza, Louisville, Kentucky 40202, Counsel for Petitioners, Richard Carpenter and Stephen Borders.



MARTIN GLAZER
Assistant Attorney General

APPENDIX

BLACKBURN CORRECTIONAL COMPLEX

NOTICE OF DISCHARGE

F. B. I. No. _____

F. P. C. DOB 44-9-15 ORIG. NO. 81665-L

LEXINGTON, KY 12-17-79

The following named prisoner whose commitment record appears below is this day being discharged from this Institution.

Name BLAIR, JEROME Number 3079-B

Date Received ORIG. 79-7-10 BCC 79-8-6 County JEFFERSON

Crime WANTON ENDANGERMENT 1st DEGREE

Sentence 1 YEARS

Discharged PAROLED

Remarks MAX. JULY 8,1980

_____ Superintendent _____

By _____ C. C.

We certify that the above named prisoner has this date been discharged on record of our office.

Chief Records Clerk Bobbi Wait

Associate Superintendent Mike O'Dea III

CERTIFICATE

I, Betty Lou Vaughn, certify that I am Supervisor of Offender Records, Bureau of Corrections, Department of Justice, Commonwealth of Kentucky and that in my official capacity all offender records of the Bureau of Corrections are maintained and in my custody and that the foregoing is a true and accurate copy of the Notice of Discharge contained in the inmate file on Jerome Blair 3079-B (81665-L).

Betty Lou Vaughn

Betty Lou Vaughn, Supervisor of Offender Records

I, a Notary Public in and for the State of Kentucky do certify that the foregoing instrument was produced before me by Betty Lou Vaughn, Supervisor of Offender Records, Bureau of Corrections, Department of Justice, Commonwealth of Kentucky on this 2nd day of June, 1980 and signed by her in my presence.

Valerie H. Coleman

Notary Public, State of Kentucky

My commission expires June 19, 1983

Supreme Court, U.S.
FILED
JUL 11 1980
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1798

RICHARD CARPENTER and
STEPHEN BORDERS - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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July 10th, 1980

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1798

RICHARD CARPENTER and
STEPHEN BORDERS - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The Respondent has raised several arguments in its Brief in Opposition which merit reply:

First, Respondent suggests and would have this Court believe that Petitioners have failed to satisfy the jurisdiction requirements for seeking a Writ of Certiorari from the Supreme Court of Kentucky. Respondent alleges that since the Supreme Court of Kentucky decided the issue on state procedural law only, Rule 19 (1) (a) precludes this Court from consideration of the Writ of Certiorari. [Respondent's Brief pp. 1-2.]

Petitioners submit that the jurisdiction requirement of Rule 19 has been satisfied beyond doubt. The Writ of Certiorari filed by Petitioners pertains to the Supreme Court of Kentucky's decision to retroactively apply a procedural rule and, thereby, uphold the Petitioners' convictions when it has been admitted by that Court and the Court of Appeals of Kentucky that there is no relevant or sufficient evidence connecting the Petitioners to any of the charged offenses. The Petitioners are simply contesting the manner in which the Supreme Court of Kentucky opted to uphold the convictions based on a procedural rule. The Court's retroactive application of that procedural rule, in effect, decided a federal question of substance in a way not in accord with applicable decisions of this Court. In particular, the Supreme Court of Kentucky's retroactive application of the procedural rule enunciated in *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977) resulted in the convictions of these petitioners being upheld upon no evidence. The Court's retroactive application has produced a result which is in direct opposition to the clear mandate for acquittal enunciated by this Court in *Jackson* v. *Virginia,* —— U. S. ——, 61 L. Ed. 2d 560, 99 S. Ct. —— (1979) and, therefore, the jurisdiction requirements of 19 (1) (a) have been satisfied.

Respondent has conveniently neglected to focus this Court's attention on paragraph one of Rule 19. That paragraph specifically provides that this Court has discretion to review any reasons that are special and important and, furthermore, that this court is not bound

by the considerations of paragraph (1) (a) discussed above:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.

Petitioners submit that a more special and important reason for granting this Writ of Certiorari is hardly imaginable. In short, a conviction based on no relevant or sufficient evidence cannot be upheld for any reason, let alone the retroactive application of a state procedural rule. Therefore, these Petitioners have also fulfilled the jurisdiction requirement of "importance" of Rule 19 (1) since the injustice they have suffered goes to the very heart of the Due Process Clause of the United States Constitution.

Secondly, Respondent would have this Court believe that the procedural rule enunciated in *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977) was not a new rule but merely "reiterated" prior law on the subject. Respondent alleges that "Kimbrough was not new law, but a reaffirmation and a rephrasing of prior, existing law". [Respondent's Brief pp. 12-13.] This is not true! The truth is that *Kimbrough* did not reaffirm, reiterate, or rephrase any prior existing law but rather substantially changed the law in effect at the time of Petitioners' trial.

Respondent alleges that *Kimbrough* did not create law, since the law was already there. As authority Respondent relys on Kentucky Criminal Rule (R.Cr.) 9.54 (2). [Respondent's Brief, Footnote 1, p. 13.] However, the Respondent's reliance on this rule is misplaced and illogical. R. Cr. 9.54 pertains to the duty of the Trial Court to submit instructions to the jury. The Commonwealth's reliance on that rule is illogical, since a Motion for Directed Verdict is effective without any assent from the jury. [Kentucky Civil Rule (C.R.) 50.01.] In other words, the Motion for Directed Verdict is made only to the trial judge and is strictly out of the scope of authority of the jury. To suggest that R.Cr. 9.54 specifies a proper time for making a Motion for Directed Verdict is ludicrous and can only be an attempt to cloud and confuse the real issue at hand.

The proper authority which pertains to the Motion for Directed Verdict is found in Kentucky Civil Rule (C.R.) 50.01, as applicable to the Kentucky Rules of Criminal Procedure through R.Cr. 13.04. That rule provides as follows:

> Rule 50.01 Motion for Directed Verdict
>
> A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have

> moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. *The order of the court granting a motion for a directed verdict is effective without any assent of the jury.* (As amended by order of the Court of Appeals dated January 14, 1969, effective July 1, 1969.)

It is important to note that this rule does not designate the time at which counsel must make a Motion for Directed Verdict in order to preserve the issue of the sufficiency of the evidence. Rather, the customary procedure and proper time for the making of a Motion for Directed Verdict to preserve the sufficiency of the evidence is determined and set forth by Kentucky case law. At the time of Petitioner's trial, Kentucky case law dictated that the question of the sufficiency of the evidence could have been preserved by making a Motion for a Directed Verdict at the close of the Commonwealth's case *or* at the close of all the evidence, or even in a Motion for a New Trial. [Writ of Certiorari, Appendix B, p. 30.] Counsel did all that was required of him by law at the time of his trial by first moving for a directed verdict at the close of the Commonwealth's case, and thereafter, again raising the question of the sufficiency of the evidence in the Motion For a New Trial. To do anything more would be requiring counsel to perform acts which would have been in vain.

In an attempt to further cloud the fact that *Kimbrough* substantially changed the law after Petitioners' trial, Respondent cites *Delong* v. *Commonwealth,* 225 Ky., 461, 9 S. W. 2d 136 (1928) and *Harvey* v. *Com-*

monwealth, Ky., 423 S. W. 2d 535 (1968) for the proposition that the appellate court of Kentucky had dealt with the exact rule enunciated in *Kimbrough* previously. [Respondent's Brief p. 12.] However, a close examination of those cases reveals that the opinions are absolutely devoid of any language which would indicate, as in *Kimbrough,* that a Motion for Directed Verdict must be made at the close of all the evidence. On the contrary, these two cases support Petitioners' position that it was customary and proper at the time of Petitioners' trial to make a Motion for Directed Verdict at the close of the Commonwealth's case. In both *Delong* and *Harvey,* the defendants had moved for a Motion for Directed Verdict only at the close of the Commonwealth's case. These cases contain absolutely no mention, either express or implied, that the defendant's should have or did move for a Directed Verdict at the close of all the evidence. Therefore, as authority they can support only two conclusions: (1) *Kimbrough* represented a substantial change from the customary procedure of moving for a Directed Verdict at the close of the Commonwealth's case; (2) Petitioners did, in fact, adhere to those very customary procedures at the time of their trial for preserving the sufficiency of the evidence.

Finally, the Respondent suggests that there was sufficient evidence upon which the Petitioners' convictions could stand. Petitioners are somewhat amazed and puzzled by this bold allegation. The short answer to Respondent's allegation is that sufficiency of the evidence has never been at issue in this appeal. All

of the Appellate Courts of Kentucky have conceded that there was no evidence to support the conviction of either BORDERS or CARPENTER. Petitioners would again like to focus this Court's attention on the two Opinions rendered by the Kentucky Court of Appeals and the Memorandum Opinion Per Curiam rendered by the Supreme Court of Kentucky. [Writ of Certiorari, Appendix A, B, C pp. 19-37.] In these Opinions both the Court of Appeals and the Supreme Court of Kentucky have unequivocally held that there was no relevant or sufficient evidence connecting these Petitioners to any charged offenses. In fact, the Supreme Court of Kentucky has already considered the almost identical evidence produced in numbers 1-19 of Respondent's Brief on pages 18-21. After closely reviewing all of this evidence that Court held that "we are of the opinion that the record before us contains no relevant evidence linking CARPENTER and BORDERS to the charged offenses". [Writ of Certiorari, Appendix C, p. 36.] Can the Respondent seriously suggest that there was sufficient evidence to uphold these convictions when the highest Courts of Kentucky have unequivocally held in three separate opinions that there was a total lack of such evidence? Petitioners again submit that the Commonwealth's argument is at best frivolous and only designed to detract from and cloud the real dispute in issue, that is, whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution can permit a conviction to be upheld based upon a retroactive application of a state procedural rule, when it has been admitted by all

Courts of Kentucky that there was no relevant or sufficient evidence to support the convictions.

In conclusion, Petitioners respectfully request this Court to grant the Writ of Certiorari in order to rectify the grave injustice that has been spawned as a result of the state's retroactive application of the *Kimbrough* rule. It is axiomatic that this Court has jurisdiction to entertain a violation of this magnitude which, in effect, goes to the very essence of the Due Process Clause of the United States Constitution.

Respectfully submitted,

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